

No. DA 09-0354

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANNY SARTAIN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Mike Salvagni, Presiding

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Danny Sartain (Sartain), the Appellant, replies to the Appellee's Brief as follows:

I. SARTAIN DID NOT ACQUIESCE TO THE DENIAL OF HIS RIGHT TO A SPEEDY TRIAL.

Sartain takes great exception to the State's claim that *his attorney's* discussion at the omnibus hearing and the fact that *his attorney* did not file a motion to dismiss until January 8, 2009, show that Sartain "did not really want a speedy trial," and that Sartain demonstrated a "lack of persistence and sincerity in objecting to the trial date." (See Appellee's Br. at 22-23.)

First, it bears repeating that Sartain, who was in custody, was not present or transported for the omnibus hearing. His attorney did not provide a written waiver of his presence, nor did his attorney make any other representation in the record as to why Sartain was not present. Nothing in the record supports the State's assertion that Sartain's attorney either had the permission or authority to make the representations that he did. In fact, in view of other comments made by Sartain's attorney, the opposite is true. The State does not even address other comments made by Sartain's attorney when asked whether, on Sartain's behalf, he would require the State to follow the explicit statutory procedure for filing a persistent felony offender notice. Sartain's own attorney stated on the record:

[Defense Counsel]: I know. You know, **I hate to do this to you, but with this guy - -**

[Prosecutor]: All right. Your Honor, if you could continue this to the end, I'll go type up a Persistent Felony Offender Notice.

THE COURT: All right.

[Defense Counsel]: **It's just because he's - -**

[Prosecutor]: That's fine.

(8/11/08 Tr. at 19, emphasis added.)

Sartain did not “acquiesce” to the trial date. At the evidentiary hearing on Sartain’s motion to dismiss, Sartain’s counsel acknowledged that he did not have authority to waive his client’s right to a speedy trial:

I think the best answer I have for you, Your Honor, is that **while I was in Court having a discussion with you and agreeing, my client apparently didn't agree.** And so and he wasn't happy with the outcome and so at his behest the Court has a speedy trial motion before it.

(2/24/09 Tr. at 46, emphasis added.)

The State, citing to two United States Supreme Court cases, argues that Sartain’s attorney was acting at Sartain’s agent at the omnibus hearing and so claims that Sartain is bound by the actions of his attorney. (Appellee’s Br. at 24-25, citing to *Vermont v. Brillon*, 129 S. Ct. 1283, 1290-91 (2009) and *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991)). Both cases can be distinguished from the case at bar.

In *Brillon*, at issue was whether delays in bringing a case to trial that were caused by a public defender *as opposed to privately retained counsel* should be

attributed to the state for purposes of evaluating a defendant's speedy trial claim. The Court found that ordinarily, there was no reason to attribute delay caused by a defendant's attorney to the State--even if the attorney was provided by the State. Important to the Court's decision, was the fact that it was Brillon's own conduct that had resulted in a major source of delay in the case. Brillon repeatedly fired and even threatened his appointed counsel. Replacement counsel had to be appointed several times and there was significant delay due to Brillon's own actions. The Court also found, as a policy matter, automatically attributing a public defender's delays to the state would provide a public defender with a perverse incentive to request frivolous continuances in the hopes of getting charges dismissed on speedy trial grounds.

In the present case, there has been no attempt to suggest Sartain is entitled to enhanced speedy trial protections because he was represented by a public defender as opposed to a privately retained attorney. There has been no attempt to suggest the district court should assign additional delay to the State because Sartain's attorney was provided by the State. In fact, neither Sartain, *nor the State*, has appealed from the district court's determination that 332 of the 357 days were correctly attributed to the State. Neither the facts nor the policy implications that were key to the Court's decision in *Brillon* are present in this case.

The second case cited by the State, *Coleman*, also does not provide support for the State's position because the case is both procedurally and factually inapposite. In *Coleman*, when discussing the issue of agency, the Court was actually addressing the question of whether the State or the petitioner would bear the risk of attorney error during postconviction proceedings. In the *Coleman* case, the Court concluded that because petitioners are not constitutionally required to be appointed an attorney for those proceedings, it would be the petitioner who would bear the risk or be bound by the actions of his attorney. In this context only, the Court found that the petitioner was bound by the actions of his attorney. Importantly, the *Coleman* court suggested a different outcome if the proceedings were those where the right to effective assistance of counsel was guaranteed. *Coleman*, 501 U.S. at 753-54.

In the present case, at issue is not whether the actions of Sartain's state appointed attorney are attributed to the State; but rather, whether the district court's finding that Sartain acquiesced to the delay is supported by the evidence. In Montana, albeit in other contexts, this Court has clarified that a party will not be bound by the actions of his attorney where there is no writing signed by the party to be bound indicating the attorney had authority to act on that party's behalf. *See e.g., Schwedes v. Romain*, 179 Mont. 466, 471, 587 P.2d 388, 391 (1978). In this case, Sartain's attorney did not present the district court with a written waiver of

Sartain's presence at the omnibus hearing or even indicate to the court verbally that he had permission to proceed in Sartain's absence. Sartain's attorney never presented the district court with a written waiver of Sartain's right to speedy trial; nor did Sartain, himself, ever take any action that resulted in a continuance of his trial date. While this Court has not yet addressed whether a defendant's presence will be required at an omnibus hearing, at this omnibus hearing, critical decisions were made in Sartain's case without his presence. Sartain's attorney's representations on the record should have alerted the court and the State that Sartain's interests were not being put first. In the absence of a written waiver or other affirmative evidence, the district court's conclusion that Sartain "acquiesced" in the delay is not supported by substantial evidence and was clearly erroneous.

Also when addressing whether Sartain was prejudiced by the delay, the State, citing to *State v. Bowser*, 2005 MT 279, ¶ 15, 329 Mont. 218, 123 P.3d 230, claims that Sartain's incarceration for his parole violation undermines his claim that he suffered from oppressive pretrial incarceration while the charges were pending in the present case. (Appellee's Br. at 26.) Again, *Bowser*, can be distinguished from the present case. In *Bowser*, the defendant was sentenced to serve 154 days following his arrest on a federal probation violation. Bowser served this time while awaiting trial on state drug possession charges. This Court

found that because this pretrial incarceration was for separate federal charges, it negated a finding of prejudice in the state case.

In the present case, while it was true that Sartain was incarcerated on a parole violation, the parole violation itself was based on the charges that were pending in the instant case. Unlike the defendant in *Bowser*, when Sartain was incarcerated, there had been no determination that he had violated his parole. In fact, the outcome of the parole violation was still pending at the time the district court ruled on Sartain's motion to dismiss. (2/24/09 Tr. at 4-8.)

Additionally, when discussing whether Sartain suffered prejudice as a result of pretrial incarceration, the State claims that it was not overwhelming or shocking for Sartain to be incarcerated in view of the fact that he had previously spent eight years in Montana State Prison. (See Appellee's Br. at 26.) First, Sartain did not previously spend eight years at Montana State Prison. As clarified by Sartain during his testimony on the motion to dismiss, when he was asked how long he had been incarcerated *in his lifetime*, he responded approximately seven years. (2/24/2009 Tr. at 34.) Second, as noted in Sartain's opening brief, it is an erroneous assumption that incarceration for a person who has previously been incarcerated is less onerous. Actually, due to the tremendous strides of rehabilitation made by Sartain after being released from prison, the opposite was true.

When addressing whether Sartain suffered anxiety and concern due to his incarceration and economic hardship because he was unable to work, the district court concluded that Sartain's anxiety and concern were not aggravated by the delay in light of Sartain's *acquiescence* in the March trial setting. (Appellee's Br. at 27.) Again, the district court's finding that Sartain acquiesced in the March trial setting is clearly erroneous. Under the facts of this case, the district court cannot presume acquiescence and to do so, improperly allocates the burden of bringing the case to trial to the defendant.

Finally, as to the impairment of the defense--Sartain did not mean to suggest that his defense was impaired because he was subject to strip searches at the prison after seeing his attorney. Sartain's point was that he did not have sufficient opportunity to meet with his attorney, a fact that was only exacerbated by the delay. Communication between Sartain and his attorney was difficult--and it was not enhanced by the delay pending trial.

Finally, to demonstrate prejudice, the State suggests Sartain must name witnesses who were lost or whose memory faded. As is demonstrated by the facts in this case, changes to memory that occur over time--especially the changes that can occur to the memory of "eyewitnesses" over time--is far more complex; but demonstrates prejudice nevertheless. In the present case, there was only one true "eyewitness." The State's case rested primarily on his testimony. Incredibly,

Hop's memory did not fade over time--but actually, the opposite. Hop, who was originally uncertain in his identification--became convinced by the time of trial that Sartain was the intruder he allegedly saw in his house. In the absence of intervening information, Hop's memory should decrease--not become more certain. Sartain has met his burden to demonstrate prejudice from the delay.

Sartain was denied his right to a speedy trial. The State had not appealed the district court's conclusion that the first two factors of the speedy trial analysis weighed in Sartain's favor. As to factors three and four, the district court's conclusion that Sartain "acquiesced" in the delay is not supported by the record and is clearly erroneous. A balancing of the four factors compels the conclusion that Sartain's right to a speedy trial was denied, and dismissal is the only proper remedy. *State v. Fife*, 193 Mont. 486, 632 P.2d 712 (1981).

II. IN THE EVENT THAT THIS COURT DOES NOT DISMISS THIS CASE BASED ON THE VIOLATION OF SARTAIN'S RIGHT TO A SPEEDY TRIAL, THEN THIS COURT SHOULD ADDRESS SARTAIN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON DIRECT APPEAL.

The State has argued that a postconviction proceeding is the appropriate forum for Sartain's claims related to the effectiveness of his counsel, because such a proceeding will provide Sartain's trial counsel the opportunity to explain his actions or inactions. Postconviction proceedings, where petitioners are often

required to appear *pro se*; provide no real remedy for defendants whose rights to effective assistance of counsel have been denied.

In the present case, Sartain asserts that to the extent that his claims of ineffective assistance of counsel are found not to be record-based, they are based on claims for which “no plausible justification” can exist for the inaction of counsel. *State v. Koughl*, 2004 MT 243, ¶ 19, 323 Mont. 6, 97 P.3d 1095.

As to Sartain’s argument that trial counsel provided ineffective assistance of counsel by not challenging the “show-up” identification prior to trial, the State claims that this argument is “unpersuasive.” The State argues that Sartain’s trial counsel “had no reason to challenge the show-up identifications because neither Hop nor Helsper could positively identify Sartain.” The State claims that the inability of Hop and Helsper to identify Sartain at the scene helped rather than hurt Sartain’s case. (Appellee’s Br. at 33.)

The State’s argument completely misses the point. If Hop and Helsper could not positively identify Sartain--there should not have been a case. The whole point in challenging the show-up identification pre-trial is to then prevent any subsequent in-court identification which was tainted by the first procedure. The problem with suggestive show-up identifications is not just that the person is identified under highly suggestive circumstances--but more importantly, the improper show-up forever taints any subsequent identification. Absent an

independent basis for identification, the impermissible show-up precludes any subsequent in-court identification. *See e.g., Simmons v. United States*, 390 U.S. 377, 383-84 (1968); *Van Pilon v. Reed*, 799 F.2d 1332, 1338 (9th Cir. 1986) (In-court identification testimony is inadmissible as violation of due process whenever pretrial encounter is so impermissibly suggestive as to give rise to very substantial likelihood of irreparable misidentification, and identification is not sufficiently reliable to outweigh corrupting effects of the suggestive procedure.).

Second, there can be no plausible justification for failing to challenge an impermissible show-up during a pre-trial hearing--as opposed to challenging the identification in front of the jury. In the present case, counsel's attempts to discredit the show-up identification resulted in the jury hearing irrelevant and prejudicial information on "standard police practices" and testimony from law enforcement how in their view, show-ups are actually benefit the defendant because, if they get the wrong guy, they let him go. This type of testimony has no place in front of a jury.

If a proper challenge to the show-up had been made in this case, it is very unlikely this case would have proceeded to trial. The State would not have been able to demonstrate that Hop had an independent basis for his in-court identification at trial. Hop admitted that his view of the intruder in his home was only "[a]s good a look as you get in a blink of an eye." (3/17/09 Tr. at 124.) Hop

said he saw the intruder as the intruder turned back to look at him from 30 feet away. (3/17/09 Tr. at 124-25.) At the trial, Hop ostensibly identified Sartain's "eyes" and not Sartain, himself. (3/17/09 Tr. at 89.) Most importantly, Hop admitted that since the incident, he had seen police mug shots of Sartain on television. (3/17/09 Tr. at 115, 118.)

Under the circumstances of this case, defense counsel's failure to file a pre-trial motion challenging the show-up identification and to challenge any subsequent identification tainted by that process fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. The trial in this case turned on eyewitness testimony and there is no question that Sartain was prejudiced by his counsel's failure to adequately challenge this evidence through a pretrial motion to suppress.

As to Sartain's other challenges to the effectiveness of his counsel, the State argues that Sartain has failed to establish prejudice necessary to be granted relief under the Strickland test. (Appellee's Br. at 39; citing to *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a Sixth Amendment claim of ineffective assistance of counsel, defendant must show that there is a "reasonable probability," that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Regarding the Strickland prejudice prong, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694; *see also*, *Price v. State*, 2007 MT 307, ¶ 15, 340 Mont. 109, 172 P.3d 1236 (“A ‘reasonable probability’ that, but for counsel’s deficient performance, a defendant claiming ineffective assistance of counsel would have succeeded, is a probability sufficient to undermine confidence in the outcome, but it does not require that a defendant demonstrate that he would have been acquitted.”). Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. *See Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir.2001). In the present case, prejudice is established by a review of the record. If a proper challenge to the show-up identification had been made, there is a very real likelihood the State would have had to dismiss this case. The failure to challenge the show-up is just one error alleged by Sartain. Even if viewed alone, this error undermines confidence in the outcome. Viewed cumulatively, prejudice has been shown.

CONCLUSION

For the reasons as stated herein, and for those as stated in Sartain’s opening brief on appeal, Sartain respectfully requests this Court to dismiss this case on the grounds that his right to a speedy trial was denied. In the event that this Court does not dismiss this case based on the violation of Sartain’s right to a speedy trial, Sartain asks that this case be remanded for a new trial.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this reply brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 5,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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